IN THE SUPREME COURT

Appeal from the Court of Appeals

HERALD COMPANY, INC., d/b/a
BOOTH NEWSPAPERS, INC. AND
THE ANN ARBOR NEWS

Docket No. 128263

Plaintiff-Appellant,

vs.

EASTERN MICHIGAN UNIVERSITY
BOARD OF REGENTS
Defendant-Appellee.

BRIEF ON APPEAL -- PLAINTIFF-APPELLANT HERALD COMPANY, INC.

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***** ORAL ARGUMENT REQUESTED *****

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STATEMENT IDENTIFYING ORDER APPEALED FROM AND INDICATING RELIEF SOUGHT

Plaintiff-Appellant Herald Company, Inc. appeals from the February 15, 2005 Opinion of the Court of Appeals (App 26a) and the March 16, 2004 Opinion of the Trial Court (App 21a). This Court granted leave to appeal by Order dated June 17, 2005.

Plaintiff-Appellant respectfully seeks the following relief:

(1) An Order expediting proceedings in this Freedom of Information Act ("FOIA") case, as required by MCL 15.240(5);

(2) An Order reversing the erroneous decisions of the Court of Appeals and the Trial Court;

(3) An Order requiring Defendant-Appellee Eastern Michigan University Board of Regents ("EMU") to produce immediately an unredacted copy of the September 3, 2003 Doyle letter (the sole document at issue); and

(4) An Order directing the Trial Court to order EMU to pay the reasonable attorneys' fees of Plaintiff-Appellant for prosecuting this FOIA case.

QUESTIONS PRESENTED FOR REVIEW

This application for leave to appeal presents three important questions for review:

(1) Did the Court of Appeals Majority use the wrong standard of review for the non-factual ("opinion") parts of the September 3, 2003 Doyle letter, by conflating the "clearly erroneous" standard of review with the more deferential "abuse of discretion" standard, instead of using only the proper "clearly erroneous" standard of review?

PLAINTIFF-APPELLANT ANSWERS: YES

DEFENDANT-APPELLEE WILL ANSWER: NO

THE COURT OF APPEALS MAJORITY WOULD ANSWER: NO

THE COURT OF APPEALS DISSENTING JUDGE WOULD ANSWER: YES

(2) For the NON-FACTUAL ("OPINION") parts of the September 3, 2003 Doyle letter, did the Court of Appeals clearly err in the "particular instance" of this FOIA case by finding that the claimed interest in keeping Doyle's opinions secret, to encourage frank communications among public officials, "clearly outweighs" the very strong public interest in disclosure of Doyle's opinions regarding EMU's misuse of public monies?

PLAINTIFF-APPELLANT ANSWERS: YES

DEFENDANT-APPELLEE WILL ANSWER: NO

THE TRIAL COURT WOULD ANSWER: NO

THE COURT OF APPEALS MAJORITY WOULD ANSWER: NO

THE COURT OF APPEALS DISSENTING JUDGE WOULD ANSWER: YES

(3) For the FACTUAL parts of the Doyle letter, did the Court of Appeals commit a legal error by failing to order disclosure, at a minimum, of those portions of the Doyle letter that are "purely factual", since the only FOIA exemption invoked by EMU by its terms does ***not*** apply to any portion of a public record that is "purely factual"?

PLAINTIFF-APPELLANT ANSWERS:	YES
DEFENDANT-APPELLEE WILL ANSWER:	NO
THE TRIAL COURT WOULD ANSWER:	NO
THE COURT OF APPEALS MAJORITY WOULD ANSWER:	NO
THE COURT OF APPEALS DISSENTING JUDGE WOULD ANSWER:	YES

I. STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This Freedom of Information Act ("FOIA") case involves a single document: a 3-page letter written on September 3, 2003 by Patrick Doyle, then Vice President for Finance at Eastern Michigan University ("EMU"), and addressed to EMU Regent Jan Brandon. The Doyle letter answered four questions that Regent Brandon had asked Vice President Doyle regarding the controversy over the very high cost of the new President's house at EMU. The Doyle letter reputedly addresses the President's accountability for the misuse of public monies, and his role in trying to hide the true costs from the public.

Plaintiff and its counsel have not seen the entire Doyle letter, although we know some things about its contents from various sources, including the Opinions of both lower courts in this case. Five facts about the Doyle letter bear special emphasis:

(1) The Doyle letter was "highly critical of the President", and therefore its disclosure would "foster accountability" and "facilitate good government." App 48a, February 15, 2005 Court of Appeals Dissenting Opinion of Whitbeck, C.J. at p 8.

(2) Vice President Doyle "had decided to retire well before he wrote his letter to Regent Brandon" and did in fact resign a few days after writing the letter, so there can be no legitimate fear in this case that disclosure of the Doyle letter might jeopardize Doyle's future job security. *Id.*

(3) The Doyle letter contains a mixture of fact and opinion, and the Trial Court found that separating fact from opinion would not be easy (but therefore, by implication, could be done). *See* App 23a, March 16, 2004 Trial Court Opinion at p 3.

(4) With respect to the "facts" in the Doyle letter, "an *in camera* review of the Doyle letter plainly discloses that all the facts are *not* in the public record." App 47a, February 15, 2005 Dissenting Opinion of Whitbeck, C.J. at p 7 (emphasis in original). Hence the public has a very strong interest in seeing the ***facts*** contained in the Doyle letter, because no matter how often EMU beats its chest about publishing its belated audit regarding the misuse of public monies on the President's house, the fact of the matter is that, according to Chief Judge Whitbeck, EMU's public disclosures were ***not*** complete.

(5) The public also has a very strong interest in seeing the ***opinions*** expressed in the Doyle letter, because Vice President Doyle was a long-standing and highly credible EMU executive with special knowledgeable about the President's house, and his opinions reputedly go directly to the core FOIA issue of governmental accountability.

In the fall of 2003, Plaintiff-Appellant Herald Company, Inc., d/b/a Booth Newspapers, Inc. and The Ann Arbor News ("the Ann Arbor News"), sent a series of written requests to the EMU Board of Regents and its fund-raising arm, the EMU Foundation, seeking copies of various public records relating to the President's house, pursuant to the Michigan FOIA, MCL §15.231 et seq.; MSA §4.1801(1) et seq. *See* App 13a-16a, Complaint, Exhibits A and B thereto.

In response, the EMU Board and the EMU Foundation withheld the September 3, 2003 Doyle letter ***in its entirety***. *See* App 17a-20a, Complaint, Exhibits C and D thereto. The EMU Board's only claimed justification for withholding the Doyle letter was, and is, the "frank communications" exemption to the FOIA, MCL §15.243(1)(m). *See* App 19a-20a, Complaint, Exhibit D thereto.

The frank communications exemption only permits a public body to withhold from disclosure those portions of a public record that meet ***all*** the following criteria:

(1) the material is "other than purely factual";

(2) the material is "of an advisory nature";

(3) the material is "preliminary to a final agency determination of policy or action"; ***and***

(4) in the "***particular instance***", the public interest in encouraging frank communications between public officials and employees "***clearly outweighs***" the public interest in disclosure of the public record at issue.

See MCL §15.243(1)(m).

A few months after EMU refused to disclose the Doyle letter, the Ann Arbor News received confidential information from reliable sources who had seen the document that, in truth, the Doyle letter does ***not*** meet the criteria listed above, for two reasons:

(1) as to the "opinions" contained in the Doyle letter, the claimed interest in secrecy does ***not*** "clearly outweigh" the very strong interest in governmental accountability, especially in the "particular instance" of this case – where taxpayer dollars were misused, and where the document's author was already resigning and hence would not be engaging in any future "communications" with EMU officials, frank or otherwise; and

(2) as to the "facts" contained in the Doyle letter, since these are "purely factual" matters, they are outside the scope of the frank communications exemption under the FOIA and plainly should have been produced to the News.

Accordingly, the Ann Arbor News promptly filed suit and asked the Trial Court to review the Doyle letter ***in camera*** and thereafter to order the letter immediately disclosed.

After receiving briefs and oral argument from both sides, and reviewing the letter *in camera*, the Trial Court issued its March 16, 2004 Opinion and Order (App 3). The Trial Court expressly found that portions of the Doyle letter do indeed "contain[] some 'factual material'." App 23a. The Trial Court also found that the "overwhelming majority" of the letter's contents were "Doyle's views concerning the President's involvement with the University House project." App 24a.

With respect to the ***non-factual*** ("opinion") portions of the Doyle letter, the Trial Court erroneously concluded that the "public interest in encouraging frank communications within the public body ... clearly outweighs the public interest in disclosure." App 24a. Since the Doyle letter goes to the core purpose of the FOIA (by shedding critical light on the accountability of government officials), and since the Michigan Supreme Court has held that the claimed public interest in encouraging candor through non-disclosure of public documents is illusory and therefore, at best, a very weak interest (particularly where, as here, the document's author had already resigned), the Trial Court's finding as to the non-factual portions of the letter – Doyle's "opinions" – was clear error.

With respect to the ***factual*** portions of the Doyle letter, the Trial Court shockingly did ***not*** order even the "purely factual" material disclosed. Since the "frank communications" exemption was the only FOIA exemption cited by the defendant (or the Trial Court) as justification for non-disclosure, and since the frank communications exemption ***by its express terms does not even apply to factual material***, and since the

FOIA expressly requires that exempt material be separated from non-exempt material, MCL §15.244(1), the Trial Court felt obliged to attempt an explanation for its egregiously erroneous decision not to order, at a minimum, the ***factual*** portions of the Doyle letter disclosed.

The Trial Court attempted to explain its ruling on the purely factual material in the Doyle letter by misinterpreting an unpublished decision of the Court of Appeals, *Barbier* v *Basso*, 2000 WL 33521028 (Mich App), to hold that if the "overwhelming majority" of the material at issue is non-factual, then it's okay to withhold ***all*** the material at issue (even the purely factual portions) under the frank communications exemption. App 23a-24a. Such a holding would directly contravene the FOIA's express language, MCL §15.244(1); and it is not at all what the Court of Appeals actually held in *Barbier*, as discussed more fully in the Argument section of this Application for Leave to Appeal.

The Ann Arbor News timely appealed the Trial Court's Order, to challenge both:

(1) The Trial Court's clearly erroneous finding that the public interest in non-disclosure "clearly outweighs" the public interest in disclosure of the ***non-factual*** portions of the Doyle letter; and

(2) The plain legal error that was the basis for the lower court's decision not to order disclosure, at a minimum, of the ***factual*** portions of the Doyle letter.

After full briefing and oral argument, the Court of Appeals issued a split decision. The majority erroneously affirmed the Trial Court's decision. App 40a.

However, in a vigorous dissent, Chief Judge Whitbeck gave ample reason for this Court to grant leave to appeal and to reverse the majority's erroneous decision:

> In construing the frank communications exemption of the FOIA the majority has posited a false choice between "good government" on the one hand and "disclosure for disclosure's sake" on the other. The FOIA contains no such choice but, by reading it into the statute, the majority assures that the contents of the Doyle letter will remain secret. In the process, the majority ignores the concept of accountability that is so essential to the process of governing. It disregards the requirement in the frank communications exemption that the public body must show *in the particular instance* the public interest in encouraging frank communications between public officials and employees of public bodies *clearly outweighs* the public interest in disclosure. It articulates what amounts to an abuse of discretion standard for appellate court review of FOIA cases. It speculates as to what may occur in the future under the guise of construing the frank communications exemption while ignoring facts that are, in my view, outcome determinative in the particular circumstances of the case. And finally, relying on a New York case, it reaches the amazing conclusion that "public welfare is more important than public knowledge." In the process, the majority overlooks the fundamental proposition that in a democracy public knowledge is essential to public welfare and ignores the explicit public policy statement in the FOIA that "[t]he people shall be informed so that they may fully participate in the democratic process."

App 41a-42a, Feb 15, 2005 Dissenting Op of Whitbeck, C.J., at 1-2. Thus Chief Judge Whitbeck identified five clear errors made by the Court of Appeals majority:

(1) The Majority used the wrong standard for appellate review of FOIA cases.

(2) The Majority ignored two outcome-determinative facts.

(3) The Majority disregarded the plain language of the frank communications exemption, which requires that the claimed interest in secrecy must "***clearly outweigh***" the public interest in disclosure, in the "***particular instance***" of the case.

(4) The Majority ignored the very strong public interest in governmental accountability.

(5) The Majority engaged in improper judicial legislation.

See App 41a-42a, February 15, 2005 Dissenting Opinion of Whitbeck, C.J. at pp 1-2. Each of these clear errors is discussed in greater detail in the Argument section *infra*.

On June 17, 2005, this Court granted The Ann Arbor News leave to appeal.

Accordingly, the Ann Arbor News now respectfully requests that this Supreme Court reverse the clear errors of the Court of Appeals Majority and the Trial Court, and also direct the Trial Court to order EMU to disclose the Doyle letter immediately and to pay the Ann Arbor News' reasonable attorneys' fees as mandated by the FOIA.

II. SUMMARY OF ARGUMENT

The parties agree that the proper standard for appellate review of the Trial Court's decision on the non-factual opinions in the Doyle letter is the "clearly erroneous" standard. However, as Chief Judge Whitbeck explained in dissent, the Court of Appeals Majority incorrectly conflated "clearly erroneous" with "abuse of discretion." If the proper "clearly erroneous" standard of review is applied, it is plain that the Trial Court and the Court of Appeals Majority clearly erred, and their decisions should be reversed.

The Trial Court found that the Doyle letter contains mostly ***non-factual*** opinions, but also some ***purely factual*** material. EMU only asserted one basis for withholding the Doyle letter: the frank communications exemption. Since this exemption by its terms applies only to non-factual material, and ***not*** to "purely factual" material, proper analysis requires treating the non-factual material separately from the purely factual material.

For the ***non-factual*** material, Chief Judge Whitbeck identified four clear errors (in addition to the use of the wrong standard of review) committed by the Majority:

- The Majority ignored the FOIA's direction to look at the particular facts of the case, speculating that disclosure might chill future frank communications from Mr. Doyle, when in fact he had already resigned from EMU.
- The Majority erroneously balanced the parties' competing interests equally, without putting a heavy thumb on the side of disclosure, as required by the express language of the frank communications exemption in the FOIA.
- The Majority ignored the very strong public interest in governmental accountability that is the core purpose of the FOIA.
- And the Majority engaged in inappropriate judicial legislation, substituting its own view that the "public welfare" is best served by secrecy, in place of the Michigan Legislature's judgment that the public interest is best served by "full and complete disclosure" of public records.

For all these reasons, the Court of Appeals Majority Opinion should be reversed and Mr. Doyle's opinions should be disclosed to the public.

For the ***purely factual*** material, the proper standard for appellate review is the *de novo* standard, because a pure legal question is presented: can a public body withhold the purely factual portions of a public record, simply because those factual portions are mixed together with arguably exempt non-factual materials? The answer under the FOIA is plainly no. The FOIA expressly requires that, where non-exempt material is inter-mingled with arguably exempt material, the non-exempt material must be separated, through redaction or other means, so it can be disclosed. MCL §15.244(1). Hence at an absolute minimum, the Court of Appeals Majority should be reversed as to the purely factual portions of the Doyle letter, which plainly must be disclosed under the FOIA.

III. ARGUMENT

A. THE COURT OF APPEALS MAJORITY USED THE WRONG STANDARD OF REVIEW FOR *BOTH* QUESTIONS RAISED BY THIS APPEAL

Two different standards of review apply to the second and third questions raised by this appeal.

For the SECOND question, as to the lower courts' application of the FOIA's "frank communications" exemption to the NON-FACTUAL (i.e., the "opinion") portions of the Doyle letter, the parties agree that the proper standard of appellate review is the "clearly erroneous" standard. *Federated Publications, Inc* v *City of Lansing*, 467 Mich 98; 649 NW2d 383 (2002); *Detroit Free Press, Inc* v *City of Warren*, 250 Mich App 164,

166; 645 NW2d 71 (2002); *see also* EMU Brief Opposing Herald Company's Application For Leave To Appeal, at pp 13-14.

For the THIRD question, as to the proper legal interpretation of whether the frank communications exemption even applies to the FACTUAL portions of the Doyle letter, the appropriate standard of appellate review is the *de novo* standard. *Herald Company* v *City of Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000).

Unfortunately, the Court of Appeals did not distinguish between the two questions raised by this appeal. Instead the Court of Appeals ignored the THIRD question entirely, and articulated neither a standard of review nor any reasons for affirming the Trial Court's erroneous ruling as to the FACTUAL portions of the Doyle letter.

Worse still, while the Court of Appeals did address the SECOND question, as to the NON-FACTUAL ("opinion") portions of the Doyle letter, the Court of Appeals Majority used the wrong standard of review. As Chief Judge Whitbeck pointed out in dissent, while the Majority gave lip service to the "clearly erroneous" standard, in reality the Majority inappropriately applied a hybrid of the "clearly erroneous" standard and the much more deferential "abuse of discretion" standard:

> The issue here is whether the interest in non-disclosure *clearly outweighs* the competing interest in disclosure *in this particular instance.* In my view, the majority skirts this issue, in the process conflating two considerably different standards of review. * * *
>
> The majority states in its section on the standard of review that the applicable standard of review is whether the trial court's ruling constitutes plain error. Curiously, later in its analysis the majority revisits the standard of review. In its later analysis, the majority refers to *Federated Publications* to bolster its position that "the clearly erroneous standard was adopted

by our Supreme Court to provide deference to trial courts that engage in precisely the type of balancing of public interests conducted here."

This is simply inaccurate, factually and logically. *Federated Publications* did not deal at all with the frank communications exemption nor with its explicit "clearly outweighs" standard. Rather, *Federated Publications* dealt with the FOIA exemption applicable to personnel records of a law enforcement agency. Therefore *Federated Publications* did not deal at all with "precisely the type of balancing of public interests conducted here." It dealt with a wholly different "equal footing" balancing scheme applicable to another, and wholly distinct, exemption in which the Legislature had *not* weighted the scales in favor of disclosure.

App 45a, February 15, 2005 Dissenting Opinion of Whitbeck, C.J. at 5 (emphasis in original). After noting the Majority's misuse of *Federated Publications* – a case that did **not** involve the frank communications exemption, but rather involved the very different language of the law enforcement personnel records exemption – Chief Judge Whitbeck went on to illustrate the Majority's incorrect use of the "abuse of discretion" standard in reviewing this FOIA case:

Beyond that, however, is the fact that the majority has in essence conflated the clearly erroneous standard with the abuse of discretion standard. *Federated Publications* did not discuss the abuse of discretion standard and, clearly, it has no application to FOIA cases. At its core, the abuse of discretion standard recognizes that in some circumstances a trial court is in a better position to make certain factual determinations and is therefore to be accorded considerable deference as "an acknowledgment of the trial court's extensive knowledge of the facts and the court's direct familiarity with the circumstances." The majority here seizes upon the word "deference", and states that because of the trial court's ability to "hear testimony and review documents *in camera* and appraise the multiple factors that influence this balance", the trial court's determination should be accorded "great deference."

There were no credibility determinations involved in the trial court's decision here. While the trial court reviewed the Doyle letter *in camera*, so have we. If there were other "multiple factors" that influenced the trial court's balancing process, those factors are not discernable from the trial

> court's opinion or from the record in this case. By conflating the clearly erroneous standard with the abuse of discretion standard, the majority has made the trial court's decision virtually unreviewable. This is a far cry from a standard that requires us, in order to reverse, to review the entire evidence and come to a definite and firm conviction that the trial court has made a mistake. The deference that is due to the trial court's decision is the deference that flows from a careful review of the evidence and from a reasoned analysis of that decision, no more and no less. I suggest that it is this review that we should be conducting in this case. I further suggest that this is not the review that the majority has conducted.

App 46a-47a, February 15, 2005 Dissenting Opinion of Whitbeck, C.J. at 6-7 .

Hence this Court should review the 3-page Doyle letter ***in camera***, using the correct standard of review for both questions raised by this appeal.

B. FOR THE NON-FACTUAL ("OPINION") PORTIONS OF THE DOYLE LETTER, THE COURT OF APPEALS MAJORITY CLEARLY ERRED IN FINDING THAT THE CLAIMED PUBLIC INTEREST IN SECRECY "CLEARLY OUTWEIGHS" THE PUBLIC INTEREST IN DISCLOSURE

1. THE FOIA IS A PRO-DISCLOSURE STATUTE THAT SHIFTS THE BURDEN OF PROOF TO THE PUBLIC BODY AND WHOSE EXEMPTIONS MUST BE NARROWLY CONSTRUED

In any FOIA case, Michigan courts must apply three fundamental principles:

(1) the Michigan FOIA is a pro-disclosure statute;

(2) the burden of proof is *on the public body* to justify non-disclosure, rather than on the party seeking disclosure of the documents; and

(3) any exemptions asserted by a public body must be *narrowly construed.*

a. Michigan's FOIA Is A Pro-Disclosure Statute. The Michigan FOIA mandates a "policy of full disclosure" of records maintained by public bodies. *Swickard* v *Wayne Co Medical Examiner*, 438 Mich 536, 543; 475 NW2d 304 (1991); *Booth Newspapers* v *U of M Board of Regents*, 444 Mich 211, 231 (1994). Even before the

FOIA was enacted in 1976, Michigan courts had long implemented the fundamental principle that the records of government belong to the public and not to the public official who is their custodian. *Nowack* v *Auditor General*, 243 Mich 200, 203-04, 208-09; 219 NW 749 (1928); *Booth Newspapers, Inc* v *Muskegon Probate Judge*, 15 Mich App 203, 205; 166 NW2d 546 (1968). This principle was codified, and reaffirmed, by the passage of the FOIA, enacted because of "concern over abuses in the operation of government." *Swickard* v *Wayne Co Medical Examiner*, 438 Mich at 543. The essence of the FOIA is that the public has a right to "full and complete information" about what its publicly-paid employees and officials are up to. MCL 15.231(2).

b. **The Burden Of Proof Is On The Public Body, Not The Requestor**. It bears special emphasis that, although Plaintiff-Appellant Ann Arbor News was the moving party on the motion to compel in the Trial Court, ***the burden of proof was and still is on Defendant-Appellee EMU***, and not the News. The FOIA expressly states:

> If a public body makes a final determination to deny a request or a portion thereof, the requesting person may commence an action in the circuit court to compel disclosure of the public records. ... The court shall determine the matter *de novo* and ***the burden of proof is on the public body*** to sustain its denial.

MCL §15.240(1) (emphasis supplied).

c. **The Exemption Asserted By EMU Must Be Narrowly Construed**. The public's broad right to inspect public documents extends to all public records except those few and specific records which the public itself, acting through its Legislature, has restricted through enactment of statutory exemptions. The custodian of the records has no such restrictive discretion to determine what to disseminate and what to withhold.

Absent application of one of the few statutory exemptions, all records requested by the public must be disclosed. MCL §15.233(1).

Moreover, the statutory exemptions themselves must be narrowly construed, in order to effectuate the manifest legislative intent favoring disclosure. *Swickard*, 438 Mich at 544; *Booth Newspapers, Inc* v *U of M Board of Regents*, 444 Mich at 231.

2. THE "FRANK COMMUNICATIONS" EXEMPTION APPLIES ONLY IF ALL FOUR OF ITS REQUIREMENTS ARE MET

The "frank communications" exemption, upon which Defendant-Appellee EMU and the lower courts rely in withholding the Doyle letter, states:

> A public body may exempt from disclosure as a public record under this act ... communications and notes within a public body ... of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. ***This exemption does not apply unless*** the public body shows that ***in the particular instance the public interest in encouraging frank communications between officials and employees of public bodies clearly outweighs the public interest in disclosure.***

MCL §15.243(1)(m) (emphasis supplied).

This exemption requires, by its plain language, that ***for each part*** of the Doyle letter that EMU seeks to withhold from the public, EMU must carry its burden of proof with respect to ***all four*** of the elements of the exemption:

(1) Each part of the public record being withheld must be non-factual;

(2) Each part of the public record being withheld must be advisory in nature;

(3) Each part of the public record being withheld must be "preliminary" to a final agency determination of policy or action; *and*

(4) In the "particular instance", the public interest in encouraging frank communications within the public body must "clearly outweigh" the public interest in disclosure of each part of the public record being withheld.

While the Ann Arbor News does not have a copy of the Doyle letter, the News concedes that with respect to the non-factual ("opinion") portions of the Doyle letter, the first three elements of the "frank communications" exemption are met. Hence the only question for the non-factual ("opinion") portions of the Doyle letter is: has EMU carried its burden of establishing, ***on the particular facts of this case***, that the claimed interest in secrecy "***clearly outweighs***" the public interest in disclosure?

3. THE MAJORITY CLEARLY ERRED BY IGNORING THE LEGISLATURE'S MANDATE THAT PUBLIC RECORDS BE WITHHELD UNDER THE "FRANK COMMUNICATIONS" EXEMPTION ONLY WHERE, "*IN THE PARTICULAR INSTANCE*", THE CLAIMED INTEREST IN SECRECY "*CLEARLY OUTWEIGHS*" THE PUBLIC INTEREST IN GOVERNMENTAL ACCOUNTABILITY

a. THE MAJORITY IGNORED THE EXPRESS STATUTORY LANGUAGE REQUIRING REVIEW OF CASE-SPECIFIC FACTS ("*IN THE PARTICULAR INSTANCE*")

In perhaps its worst error, the Majority ignored the specific facts of this case. Instead of acknowledging the two facts that Chief Judge Whitbeck found to be "outcome determinative", the Majority instead engaged in unfounded speculation about the harms the Majority feared might arise in hypothetical future situations if frank communications were disclosed. In the process, the Majority ignored not only the express language of the FOIA, it also flouted Michigan Supreme Court precedent.

The two facts Chief Judge Whitbeck found to be outcome-determinative were:

(1) The Doyle letter was "highly critical of the President", and therefore its disclosure would "foster accountability" and "facilitate good government." App 48a, February 15, 2005 Court of Appeals Dissenting Opinion of Whitbeck, C.J. at p 8.

(2) Vice President Doyle "had decided to retire well before he wrote his letter to Regent Brandon" and did in fact resign a few days after writing the letter, so there can be no legitimate fear in this case that disclosure of the Doyle letter might jeopardize Doyle's future job security. *Id.*

In the "particular instance" of this case, the ***first*** of Chief Judge Whitbeck's "outcome determinative" facts shows that the public interest in disclosure here is the strongest possible interest: disclosure would serve the core purpose of the FOIA, which is governmental accountability. Michigan "courts favor disclosure under the FOIA balancing test when a government official's actions constitute a violation of public trust," *Swickard*, 438 Mich at 595. Since the Doyle letter addresses the very serious question of whether the EMU President's lavish spending of public monies on his own house breached the public trust, Chief Judge Whitbeck correctly found the fact that the Doyle letter criticizes government spending to be "outcome determinative" on the issue of whether disclosure is mandated by the FOIA.

By the same token, and again in the "particular instance" of this case, the ***second*** of Chief Judge Whitbeck's "outcome determinative" facts shows that EMU's claimed interest in secrecy is, at best, a very weak interest ***in this case***:

> The second fact central to our consideration of this case is that it is apparent that Mr. Doyle had decided to retire well before he wrote his letter to Regent Brandon and, as the trial court noted in its opinion, Mr. Doyle resigned several days after he wrote that letter. The majority's concern that a high level administrator such as Mr. Doyle might be "naturally reluctant" to give his candid opinion of the "highest ranking official in the administration, the president, his immediate superior, whose favor he needs for job security" is thus absolutely unfounded. Mr. Doyle could have no fears as to his future job security, or as to the president's "favor", because

> he had already decided to retire. Further, he had made that decision known to the president months before he penned his letter to Regent Brandon.

App 48a-49a, February 15, 2005 Dissenting Opinion of Whitbeck, C.J. at pp 8-9.

Yet instead of responding to Chief Judge Whitbeck's focus on the actual facts of ***this case***, the Majority conjures out of thin air concerns about disclosure of frank communications that might apply in some hypothetical future case:

> The majority ... offers a series of generalized policy statements in support of its view. (For example, that "The natural human tendency to 'circle the wagons' or 'play it safe', coupled with apprehension of retaliation if the written opinion is made public would, we fear, deprive the Board of an important perspective.")

App 47a. The problem with the Majority's argument here, as Chief Judge Whitbeck notes, is that the Legislature expressly mandated that the "frank communications" exemption must take into account the "particular instance" of this case, and not the hypothetical future problems raised by the Majority:

> Ostensibly, these statements [of the Majority] are related to the situation that the University's Board of Regents faced here. However, these generalized concerns do not actually relate to the particular circumstances of this case; in fact, they express an overall view on proper public policy not with respect to *this* instance but as to *future* instances. But speculation as to what may occur in the future is not our task when construing the frank communications exemption of the FOIA. By the language of the exemption, our task is to confine our inquiry to the "particular instance" of this case. If we limit our inquiry to the facts as they exist here, then I am at a loss to understand how the public interest in encouraging frank communications "clearly outweighs" the public interest in disclosure.

App 47a-48a. Indeed, the Majority's unfounded speculation about future problems not only runs afoul of the actual language of the FOIA exemption it is supposed to be construing; it also flouts Michigan Supreme Court precedent.

The Michigan Supreme Court has expressed great skepticism that secrecy actually serves to encourage candor in communications within a public agency. In a FOIA case involving evaluations of school teachers and administrators, this Supreme Court rejected the claim that such evaluations should be withheld from the public under the frank communications exemption, and expressly rejected the argument that secrecy fosters candor:

> The plaintiffs assert that the integrity of the evaluation process will be compromised by the disclosure of their personnel records. They suggest that the evaluators will be less inclined to candidly evaluate their employees if the evaluations are to be made public. **We draw the opposite conclusion. Making such documents publicly available seems more likely to foster candid, accurate, and conscientious evaluations than suppressing them because the person performing the evaluations will be aware that the documents being prepared may be disclosed to the public, thus subjecting the evaluator, as well as the employee being evaluated, to public scrutiny.** The knowledge that their efforts may be brought before the public at some distant date may encourage those who evaluate their peers to accurately reflect the achievements, or lack thereof, of those being evaluated.

Bradley v *Saranac*, 455 Mich 285, 299-300; 565 NW2d 650 (1997) (emphasis supplied); *see also Univ of Penn* v *EEOC*, 493 US 182; 110 SCt 577; 107 L Ed 2d 571 (1990) (holding disclosure of evaluations of university professors would not "chill" candor); *Federated Publications, Inc* v *City of Lansing*, 2000 WL 33401843 (Mich App) (unpublished decision), *aff'd in part and rev'd in part*, 467 Mich 98; 649 NW2d 383 (2002), Ct Appeals slip op at p 5 (holding that candor in police internal affairs investigations is ***not*** encouraged by withholding internal affairs records from FOIA requestors).[1]

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[1] The Court of Appeals also recently considered the frank communications exemption in *Herald Company, Inc* v *Kent County Sheriff's Dept*, 261 Mich App 32; 680 NW2d 529 (2004) (rejecting Sheriff's claim that public interest in "frank communications" in police internal affairs matters "clearly outweighed" public interest in disclosure of contents of the internal affairs files).

The same finding should be made here with respect to the Doyle letter. Disclosure of the Doyle letter will encourage, rather than discourage, frank communications among EMU officials, because, as this Court observed in *Bradley*, disclosure of the Doyle letter will remind public officials that they must be accountable for what they say and write.

Accordingly, whatever "public" interest exists (if any) in the non-disclosure of the Doyle letter must be, at best, a ***very weak*** "public" interest. By contrast, the public interest in getting to the bottom of the EMU President's involvement in, and accountability for, the high hidden costs of the President's house is as strong as any public interest can be. It goes to the "core purpose" of the FOIA: to know what government is up to. *Booth, supra.* The Doyle letter speaks – in the voice of a well-respected high-ranking EMU officer who had broad responsibility for the President's house, and who resigned at the time the high cost of the President's house became known – to critical issues of the EMU President's accountability and, ultimately, to the accountability of the EMU Board of Regents.[2]

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[2] Indeed, as Amicus Curiae Michigan Association of Broadcasters and Michigan Press Association point out in their Amicus Brief, the accountability of the EMU Board of Regents is constitutionally mandated:

> All financial records, accountings, audit reports and other reports of public monies shall be public records and open to inspection. A statement of all revenues and expenditures of public monies shall be published and distributed annually, as provided by law.

Michigan Constitution, Article IX, §23. Thus the Court of Appeals Majority's erroneous interpretation of the FOIA as permitting EMU to withhold the Doyle letter (which clearly qualifies as a "report of public monies") is not only statutorily indefensible, it is also constitutionally infirm because it violates Article IX, Section 23.

The Court of Appeals Majority here committed clear error when it ignored the plain language of the FOIA, the persuasive reasoning of this Court in *Bradley*, and the two outcome-determinative facts identified by Chief Judge Whitbeck. Accordingly, leave to appeal should be granted and the Court of Appeals decision should be reversed.

b. LIKE THE TRIAL COURT, THE MAJORITY ALSO IGNORED THE "CLEARLY OUTWEIGHS" LANGUAGE OF THE FOIA'S FRANK COMMUNICATIONS EXEMPTION.

Chief Judge Whitbeck correctly points out that, while both the Trial Court and the Majority gave lip service to the "clearly outweighs" language in the frank communications exemption, when it came to actually perform the balancing test, both courts showed through their own words that they did not actually give force to the FOIA requirement that the secrecy interest must not only "outweigh" the disclosure interest, the secrecy interest must "***clearly*** outweigh" the disclosure interest. Instead, both courts balanced the two competing interests as if the only task were to conduct an 'equal footing' balancing. This was clear error, because it ignores the plain language of the FOIA.

To be sure, the frank communications exemption does require a balancing of the claimed interest in secrecy against the public interest in disclosure. But the statute by its terms requires an *unequal* balancing. As Chief Judge Whitbeck observed, "in the frank communications exemption the Legislature, in a manner of speaking, put its thumb on the scale." App 44a, February 15, 2005 Dissenting Opinion of Whitbeck, C.J. at p 4.

The unequal balancing is required by two aspects of the statute:

> The Legislature placed the burden squarely on the public body to show that the interest in non-disclosure *clearly outweighs* the interest in disclosure. In addition, the Legislature provided that this showing must be made in the

> particular instance. Thus, in the frank communications exception the competing interests in non-disclosure versus disclosure do not stand on equal footing. Rather, the Legislature has weighted the balance in favor of disclosure.

App 44a-45a, Feb 15, 2005 Dissenting Op of Whitbeck, C.J., at pp 4-5.

Unfortunately, neither the Trial Court nor the Court of Appeals Majority placed their thumb on the side of disclosure, as required by the statute, when they balanced the interests at issue. The Trial Court erroneously conducted the balancing thus:

> Plaintiff's specific need for this letter, apparently to "shed light on the reasons why a highly respected public official resigned in the wake of EMU being caught misleading the public as to the true cost of the President's house", or the public's general interest in disclosure, is outweighed by Defendant's interest in maintaining the quality of its deliberative and decision-making process.

App 24a, March 16, 2004 Trial Court Opinion, at p 4. To be sure, the Trial Court elsewhere quoted the "***clearly*** outweighs" language of the statute in a conclusory way; but as the quotation above demonstrates, when it came time to actually perform the balance, the Trial Court evinced no recognition that the burden of proof was on EMU, and evinced no recognition that EMU's burden was not just to show its claimed interest in secrecy "outweighs" the public interest in disclosure, but rather to show that its claimed interest in secrecy "***clearly*** outweighs" the public interest in disclosure.

The Court of Appeals Majority committed the same error:

> [w]hen, as here, the public body makes the proper showing that good governance is better served by nondisclosure rather than disclosure, it will not be required to release the information.

App 34a, February 15, 2005 Majority Op of the Court of Appeals, at p 9. Again, to be sure, the Court of Appeals Majority elsewhere paid lip service to the "clearly outweighs"

language of the statute—but only in a conclusory way. As the quotation above shows, when it came time to actually balance the interests, the Majority, like the Trial Court, evinced no recognition that EMU still had the burden of proof to show that its claimed interest in secrecy "***clearly*** outweighs" the very strong public interest in disclosure here.

Since Defendant-Appellee EMU bears the burden of proof on this issue, and since EMU must prove that the public interest in non-disclosure not only "***outweighs***" the public interest in disclosure but also "***clearly*** outweighs" the public interest in disclosure, and since the public interest in non-disclosure (if any) is at most a very weak interest while the public interest in disclosure is the strongest possible public interest, the Court of Appeals Majority clearly erred in finding that the non-factual ("opinion") portion of the Doyle letter meets the test for exemption under the frank communications exemption.

4. THE MAJORITY CLEARLY ERRED BY IGNORING THE CORE PUBLIC INTEREST IN GOVERNMENTAL ACCOUNTABILITY

Even more fundamentally, the Majority committed clear error by disregarding the purpose and structure of the FOIA, and thereby unfairly discounting the core public interest in governmental accountability which is the essence of the FOIA:

> ... as citizens we must be able to hold our elected and appointed officials accountable for the decisions that they make on our behalf. Accountability, in turn, depends on information; we cannot make an informed judgment about whether a decision of a government official was the correct one without having at least some information about that decision. In 1976, the Michigan Legislature took a decisive step toward regularizing the access that citizens have to information about governmental decision-making and, thereby, toward ensuring accountability by elected and appointed governmental officials. That step was the passage of the FOIA.

App 42a-43a, February 15, 2005 Dissenting Opinion of Whitbeck, C.J. at pp 2-3.

The Majority exhibits its reckless disregard of the FOIA's structure and purpose most blatantly when it makes belittling references to "disclosure for disclosure's sake." The Majority acts as if the media's interest in disclosure here were nothing more than the frivolous interest of prurient gossips, rather than the serious and fully appropriate interest of government watchdogs seeking to hold public officials accountable for their actions, for the benefit of the taxpaying citizens in our democracy who cannot spare the time to watch the government as closely as the media can.

This is a fundamental error, arising from a failure to understand the structure and purpose of the FOIA, whose express purpose is to provide "full and complete information" (MCL §15.231) to Michigan citizens about what its government is up to:

> The majority's opinion here keeps the Doyle letter, a document that was highly critical of the president, hidden from public view. It posits, in my view, a false choice between "good government" on the one hand and "disclosure for disclosure's sake" on the other. There is no provision in the FOIA for disclosure for disclosure's sake. Rather, there is a broad policy decision by a fully cognizant Legislature that disclosure, because it fosters accountability, facilitates good government. To hide the contents of the Doyle letter behind the façade of a Manichean choice between "good government" and the disclosure of arguably extravagant and inappropriate expenditures of public funds by a public official is not only to run from reality, it is to obscure the very existence of that reality.

App 48a, Feb 15, 2005 Dissenting Op of Whitbeck, C.J., at p 8.

This fundamental error of the Majority in ignoring the core public interest in governmental accountability provides a separate and independent ground for reversing the Court of Appeals.

5. THE MAJORITY IMPROPERLY ENGAGED IN "JUDICIAL LEGISLATION", SUBSTITUTING ITS OWN VIEW OF GOOD PUBLIC POLICY FOR THE LEGISLATURE'S

As Chief Judge Whitbeck points out, the Majority's refusal to apprehend the structure and purpose of the FOIA was not accidental. Rather, it resulted from a studied and deliberate refusal to defer to the policy judgments of the duly-elected Michigan Legislature:

> While the Legislature did not, and could not, provide for complete access to information, it did significantly shift the balance away from restricted access to open access in all but a restricted number of instances. The Legislature therefore necessarily made the decision that disclosure, except in a limited number of instances, *facilitates* the process of governing because it incorporates the concept of accountability.
>
> This was a deliberate, reasoned policy choice and one to which we in the judiciary should, in the process of judicial review, defer. In my view, the majority here exhibits no such deference. Rather, the majority substitutes its own view of proper policy – that the process of governing would be *hindered* in the context of the "frank communications" exemption by providing access to the Doyle letter – on grounds that are suspect at best when the actual language of that exemption is examined.

App 43a-44a, February 15, 2005 Dissenting Op of Whitbeck, C.J. at pp 3-4 (emphasis in original). The Majority's deliberate "substitution of its own view of proper policy" is nothing less than improper judicial legislation. And the clear error that results is nothing less than the circumvention, and ultimately evisceration, of the FOIA itself. As Chief Judge Whitbeck put it, this last clear error of the Majority is its most "profound":

> In my view, this error is profound. The majority reaches the astounding conclusion that in Michigan the "public welfare" – defined without regard to the particular circumstances of this case – is more important than public knowledge. If this is the law of this state, then the Legislature's broad policy decisions in the FOIA and its carefully-tuned implementing mechanisms are without meaning. In the process, a narrowly

> tailored exemption from the broad sweep of the Act will have swallowed the overall rule. Within the context of the frank communications exemption, this consigns our citizens to the receipt of only that information that the public body determines it is safe, according to *its* definition of the public welfare, to release. I cannot agree that this is the result the Legislature intended.

App 52a, Feb 15, 2005 Dissenting Op of Whitbeck, C.J., at p 12 (emphasis in original).

To avoid 'allowing the frank communications exemption to swallow the FOIA whole', and to avoid 'consigning Michigan's citizens to the receipt of only that information that public bodies determine it is safe, according to their own definition of public welfare, to release', Plaintiff-Appellant Ann Arbor News respectfully urges this Court to reverse the clearly erroneous decision of the Court of Appeals regarding the non-factual ("opinion") portion of the Doyle letter.

C. FOR THE PURELY FACTUAL PORTIONS OF THE DOYLE LETTER, NO SERIOUS QUESTION EXISTS THAT THOSE PORTIONS SHOULD BE DISCLOSED TO THE PUBLIC IMMEDIATELY

1. THE PROPER STANDARD OF REVIEW FOR THIS QUESTION IS THE *DE NOVO* STANDARD

For the SECOND question raised by this appeal, regarding the proper legal interpretation of whether the frank communications exemption even applies to the FACTUAL portions of the Doyle letter, the appropriate standard of appellate review is the *de novo* standard. *Herald Company* v *City of Bay City*, 463 Mich 111, 117; 614 NW2d 873 (2000).

2. THE DOYLE LETTER CONTAINS SOME "PURELY FACTUAL" MATERIAL THAT IS SEVERABLE FROM THE REST OF THE DOCUMENT

The Doyle letter clearly contains some factual material, and this factual material is clearly severable from the non-factual opinions in the letter. The Trial Court found that:

> Although the document contains some "factual material", it is primarily a summary of events from Doyle's perspective. Any factual material contained in the letter is not easily severable.

App 23a, March 16, 2004 Opinion of Trial Court, at p 3. As a matter of logic, material that is "***not easily*** severable" must be, in fact, severable.

Moreover, the factual material contained in the Doyle letter includes at least some material that is ***not*** contained in the auditors' report released by EMU or elsewhere in the public record:

> Here, an *in camera* review of the Doyle letter plainly discloses that all the facts are *not* in the public record.

App 47a, February 15, 2005 Dissenting Opinion of Chief Judge Whitbeck at p 7 (emphasis in original).

Obviously, reasonable people can sometimes differ about what is "fact" and what is "opinion." However, on information and belief, at least one of the four questions posed by EMU Regent Brandon was something to the effect of "who had oversight of the President's spending?", to which Vice President Doyle (who had broad oversight over all aspects of the costs related to the President's house) reputedly replied, tersely, "no one." That is clearly a fact, not an opinion, and there can be no serious argument from EMU that, at the very least, that question and answer constitute an easily severable fact.

3. THE "FRANK COMMUNICATIONS" EXEMPTION OF THE FOIA, BY ITS TERMS, DOES *NOT* APPLY TO "PURELY FACTUAL" MATERIALS

The frank communications exemption of the FOIA states in pertinent part:

> A public body may exempt from disclosure ... under [the FOIA] ... communications ... within a public body ... of an advisory nature to the extent that they cover ***other than purely factual materials*** and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that ... the public interest in encouraging frank communication between [public] officials and employees clearly outweighs the public interest in disclosure.

MCL 15.243(1)(m)(emphasis supplied). Hence there can be no serious question: there is no FOIA exemption that applies to the ***factual*** statements contained in the Doyle letter.

4. WHERE A PUBLIC RECORD CONTAINS A MIX OF SOME ARGUABLY EXEMPT MATERIAL AND SOME NON-EXEMPT MATERIAL, A PUBLIC BODY IS REQUIRED, AT AN ABSOLUTE MINIMUM, TO SEPARATE OUT THE NON-EXEMPT MATERIAL AND TO PRODUCE IT

The Michigan Freedom of Information Act does not permit a public body such as EMU to hide non-exempt public information, such as the "purely factual" portions of the Doyle letter, amid arguably exempt material, such as the opinions in the Doyle letter. Very much to the contrary, the FOIA requires that public bodies design public records so that exempt and non-exempt materials are easily severable, MCL §15.244(2), and the FOIA further requires that the public body separate and produce the non-exempt material:

> If a public record contains material which is not exempt under [the FOIA exemptions], as well as material which is exempt under [the FOIA exemptions], the public body ***shall separate the exempt and non-exempt material*** and make the nonexempt material available for ... copying.

MCL 15.244(1)(emphasis supplied).

5. NO JUSTIFICATION EXISTS FOR EMU'S FAILURE TO PRODUCE, AT AN ABSOLUTE MINIMUM, THE FACTUAL PORTIONS OF THE DOYLE LETTER

EMU has never offered any Michigan law as justification for its failure to produce, at an absolute minimum, the ***factual*** portions of the Doyle letter. The best EMU has been able to come up with was an inapposite federal case, *Montrose Chemical Corp of Cal* v *Train*, 491 F2d 63 (DC Cir 1974), which was construing an entirely different provision from an entirely different statute. *Montrose* offers no instruction for the instant case because, as Chief Judge Whitbeck observed in dissent, unlike the instant case, *Montrose* involved a situation where "all the facts concerning the matter at issue were in the public record and, therefore, the document that was being withheld was to a considerable extent redundant." App 47a, February 15, 2005 Dissenting Opinion of Whitbeck, C.J. at p 7.[3]

The Trial Court at least attempted to use *Michigan* law to justify its erroneous decision not to order production, at an absolute minimum, of the factual portions of the Doyle letter. However, the Trial Court's attempted justification required it to resort to a

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[3] Instead of citing Michigan law, EMU offers only willfully bizarre misreadings of the FOIA in its vain attempt to justify its failure to produce, at a minimum, the factual portions of the Doyle letter. See, eg, EMU's Brief Opposing Herald Company's Application for Leave to Appeal, at pp 22-29. EMU recklessly seeks to turn the FOIA on its head and allow the "frank communications" exemption to swallow the FOIA whole, by arguing that so long as a document has ***any*** arguably exempt non-factual material, the ***entire document*** may be exempted.

EMU's sophistry might seem laughable, since it so obviously ignores the plain language of the FOIA, which requires public bodies such as EMU to separate exempt from non-exempt material, even within an individual document. MCL 15.244(1). However, EMU's sophistry is no joke because, if adopted by this Court, it would provide an easy blueprint for any public body to follow anytime it wished to avoid the strictures of the FOIA: just be sure to include a few arguably exempt opinions in the midst of otherwise factual documents, and then you can withhold the entire document! *See* detailed discussion *infra* at pp 30-31 as to why EMU (and the Trial Court) are flat wrong in arguing that the presence of some arguably exemptible material in a document permits a public body to withhold even the purely factual portions of the document.

tortured misreading of an unpublished Court of Appeals decision, *Barbier* v *Basso* – a misreading so egregious that the Court of Appeals Majority did not even bother trying to defend the Trial Court on this point.

The Trial Court committed plain legal error when it erroneously held:

> Further, under recent persuasive Michigan authority, a court may determine that a particular document that contains "substantially more opinion than fact" falls within the [frank communications] exemption. *Barbier* v *Basso*, 2000 WL 33521028 (Mich App).

App 23a-24a, March 16, 2004 Trial Court Op, at pp 3-4. Legally that's just plain wrong. The FOIA nowhere permits the otherwise non-exempt factual portions of a document to be withheld under the frank communications exemption just because they happen to be contained within a document that contains "substantially more opinion than fact." Very much to the contrary, the FOIA mandates that the non-exempt factual portions must be disclosed. MCL §15.243(1)(m); MCL §15.244(1). Hence if the unpublished – and therefore non-precedential – decision in *Barbier* v *Basso* had really said that a public body could shirk its duty to separate out the factual material and produce it, then that decision would be flat wrong and this Court would be obliged to overrule it.

But *Barbier* v *Basso* didn't say that. Not at all. In truth, very much to the contrary, *Barbier* involved a situation where – unlike the instant case – the plaintiff apparently did "not challenge the trial court's findings pertaining to defendant's satisfaction of the [frank communications] exemption's substantive conditions." *Barbier*, 2000 WL 33521028 (Mich App), at p 2. The frank communications exemption's "substantive conditions" include, of course, the condition that each portion of the

document being withheld contains zero "purely factual" material. If plaintiff in *Barbier* did "not challenge" a finding that the documents contained zero "purely factual" material, then *Barbier* was plainly a completely different case than the instant case – where the trial court conceded that the Doyle letter does indeed "contain[] some 'factual material'." App 23a, March 16, 2004 Trial Court Opinion, at p 3.

To be sure, the lower court in the instant case did quote some unfortunate passing *dictum* that appears in the *Barbier* decision, alluding to documents that apparently contained "substantially more opinion than fact." But the *Barbier* court nowhere held or even said that such documents may be withheld in their entirety ***simply because*** they contain "substantially more opinion than fact"; rather, the *Barbier* court held, and said, that such documents can be withheld in their entirety only if, as was the case in *Barbier* but not in the instant case, the documents meet all the "substantive conditions" of the frank communications exemption, including the necessary "condition" that the documents contain no factual material. *Id.*

The Trial Court's holding that documents can be withheld in their entirety if they contain "substantially more opinion than fact" is a holding that, if not reversed, jeopardizes the entire pro-disclosure purpose of the FOIA. The Trial Court's holding would tempt public bodies to bury embarrassing facts deep in the midst of opinion-laden documents, and thereby avoid their duty to produce the factual material in response to FOIA requests. Indeed, the Trial Court's holding also invites public bodies to disregard the FOIA's mandate that, to the extent practicable, public records be "designed" in a manner that "facilitate[s] [] separation of exempt from nonexempt information." MCL

§15.244(2). Instead, the Trial Court here provides an anti-disclosure blueprint for public bodies to avoid having to produce embarrassing but nonexempt information: simply hide embarrassing information deep within documents containing mostly exempt (or, as here, ***arguably*** exempt) information. This is not what the Michigan Legislature intended.

In short, the Trial Court's reliance on *dictum* in an unpublished decision was misplaced and does not support the radical and legally erroneous conclusion that, notwithstanding the plain language of the FOIA to the contrary, a document may be withheld in its entirety if it contains "substantially more opinion than fact." The Trial Court's erroneous conclusion here ignored the plain language of the FOIA and, accordingly, should be promptly reversed.

In a futile attempt to shore up the trial court's erroneous misreading of *Barbier* v *Basso*, Defendant-Appellee may cite federal cases. However, these citations are inapposite for, as this Court has previously cautioned, the federal FOIA is worded differently than the Michigan FOIA and hence federal FOIA decisions are of limited applicability when construing exemptions to the Michigan FOIA. *Mager v Dep't of State Police*, 460 Mich 134; 595 NW2d 142 (1999).

Since no justification – not even an arguable one – exists for EMU's withholding the factual portion of the Doyle letter, this Court should, at an absolute minimum, reverse the Court of Appeals as to the factual portion of the Doyle letter.

D. THE FOIA MANDATES THAT FOIA APPEALS BE EXPEDITED

MCL §15.240(5) mandates:

> ... an appeal from [a FOIA case] shall be assigned for ... argument at the earliest practicable date and expedited in every way.

Accordingly, Plaintiff-Appellee respectfully requests that this Court assign the case for briefing and argument at the earliest practicable dates.

E. CONCLUSION

Accordingly, Plaintiff-Appellant Herald Company, Inc., d/b/a Booth Newspapers, Inc. and The Ann Arbor News, respectfully requests that this Court grant the following relief:

(1) An Order expediting proceedings in this Freedom of Information Act ("FOIA") case, as required by MCL 15.240(5);

(2) An Order reversing the erroneous decision of the Court of Appeals;

(3) An Order requiring Defendant-Appellee Eastern Michigan University Board of Regents ("EMU") to produce immediately an unredacted copy of the September 3, 2003 Doyle letter (the sole document at issue); and

(4) An Order directing the Trial Court to order EMU to pay the reasonable attorneys' fees of Plaintiff-Appellant for prosecuting this FOIA case.

Respectfully submitted,

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